

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

<b>RAYNOR MFG. CO.,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>CIVIL ACTION</b>
<b>v.</b>	)	<b>Case No. 07-2421-DJW</b>
	)	
<b>RAYNOR DOOR CO., INC., and</b>	)	
<b>KELLY STONER and</b>	)	
<b>JANET STONER, individually,</b>	)	
	)	
<b>Defendants.</b>	)	

**MEMORANDUM AND ORDER**

Pending before the Court is the Motion to Reconsider Memorandum and Order (65)<sup>1</sup> (doc. 87) filed by Defendant Raynor Door Co., Inc. (“Defendant”). Defendant asks the Court to reconsider its decision granting summary judgment on Defendant’s counterclaim against Plaintiff.<sup>2</sup> Defendant’s Motion is fully briefed and, thus, is ripe for consideration. For the reasons set forth below, the Motion is denied.

**I. BACKGROUND**

The Court previously set out a detailed background of this case in its Memorandum and Order (doc. 81) granting Plaintiff’s motion for summary judgment on Defendant’s counterclaim and, therefore, finds there is no need to repeat that information in this Order. Instead, the Court will set out the background relevant for the purposes of this Order.

Plaintiff brought an action against Defendant and defendants Kelly Stoner and Janet Stoner alleging trademark infringement and unfair competition, and Defendant counterclaimed for alleged

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<sup>1</sup> Although the title of Defendant’s Motion appears to reference document number 65, the Court assumes that Defendant meant to reference the Court’s Memorandum and Order (doc. 81), which granted Plaintiff’s Motion for Summary Judgment on Counterclaim (doc. 65).

<sup>2</sup> See Mem. and Order (doc. 81) granting Pl.’s Mot. for Summ. J. on Countercl.

violation of the Robinson-Patman Act, 15 U.S.C. § 13.<sup>3</sup> Plaintiff has been a manufacturer of sectional doors, including commercial and residential garage doors and related products, since 1944.<sup>4</sup> Defendant sells commercial garage doors and related products.<sup>5</sup>

Defendant claims that Plaintiff violated the Robinson-Patman Act based on the following allegations:

[R]elevant sales were made in interstate commerce; the products were of like grade and quality; the Plaintiff discriminated in price between the Defendant and another purchaser of the products in the Lawrence, Topeka, and Kansas City markets; and the effect of such discrimination may be to injure, destroy, or prevent competition to the advantage of the favored purchaser, i.e., the purchaser who received the benefit of such discrimination . . .<sup>6</sup>

The only “favored purchaser” identified by Defendant is Raynor Door Company of Kansas City (“RKC”).<sup>7</sup> Defendant claims that Plaintiff discriminated between Defendant and RKC by giving RKC “blanket discounts, free shipping, and or high discounts and incentives and other methods in which the costs of the products were reduced below what the Defendant was charged for the products.”<sup>8</sup>

Plaintiff filed its Motion for Summary Judgment on Counterclaim, arguing that Defendant’s Robinson-Patman Act counterclaim failed for several reasons, including that Defendant failed to show the requisite harm to competition, Defendant’s counterclaim is barred by the statute of

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<sup>3</sup> See Pretrial Order (doc. 63) at 1, 10, 18 and 21-22.

<sup>4</sup> See *id.* at 2.

<sup>5</sup> See *id.*

<sup>6</sup> *Id.* at 10.

<sup>7</sup> See *id.* at 12; see also Mem. in Opp’n 2.

<sup>8</sup> Pretrial Order 12.

limitations, and Defendant failed to show the requisite contemporary purchases by Defendant and RKC.<sup>9</sup>

In deciding Plaintiff's motion for summary judgment, the Court analyzed several evidentiary issues, including Defendant's reliance on the "deal file" and Defendant Kelly Stoner's deposition testimony regarding the "deal file." The Court concluded that Defendant Kelly Stoner's deposition testimony regarding the "deal file" was inadmissible to authenticate the "deal file," and found that the "deal file" was not properly authenticated and therefore was not admissible evidence.<sup>10</sup> Accordingly, the Court did not consider the "deal file" for the purpose of ruling on Plaintiff's motion for summary judgment.<sup>11</sup> Defendant then filed the instant Motion asking the Court to reconsider its Memorandum and Order (doc. 81) on the grounds that the Court erred in excluding the "deal file."

## **II. STANDARD**

Defendant's Motion fails to cite to any federal or local rule and fails to provide any legal authority as to why this Court should grant the Motion for reconsideration. Instead, Defendant simply argues that the Court erred in excluding the "deal file," and therefore should reconsider its Memorandum and Order (doc. 81).

Defendant's Motion is subject to D. Kan. Rule 7.3(a), which applies to motions seeking reconsideration of dispositive orders such as the Court's Memorandum and Order (doc. 81). According to D. Kan. Rule 7.3(a), Defendant's Motion "must be filed pursuant to Fed. R. Civ. P.

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<sup>9</sup> See Mem. in Supp. of Pl.'s Mot. for Summ. J. on Countercl. (doc. 66) at 1-2.

<sup>10</sup> See Mem. and Order (doc. 81) at 9-10.

<sup>11</sup> See *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1122 (10th Cir. 2005) (For purposes of summary judgment, the content or the substance of the evidence must be admissible.).

59(e) or 60.” A motion for reconsideration “filed within ten days of the district court’s entry of judgment . . . [is] treated as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e).”<sup>12</sup>

Because Defendant’s Motion was filed within 10 days of the entry of the Court’s Memorandum and Order (doc. 81), the Court considers Defendant’s Motion under Rule 59(e).

“Whether to grant or deny a Rule 59(e) motion is within the district court’s sound discretion.”<sup>13</sup> “Grounds warranting a motion to reconsider [under Rule 59(e)] include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.”<sup>14</sup> “[A] party cannot invoke Rule 59(e) to raise arguments or present evidence that should have been set forth in the first instance or to rehash arguments previously considered and rejected by the court.”<sup>15</sup> Nor is a motion to reconsider “a second chance for the losing party to make its strongest case or to dress up arguments that previously failed.”<sup>16</sup>

### III. ANALYSIS

Defendant does not argue that the Court’s Memorandum and Order (doc. 81) should be

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<sup>12</sup> *Hatfield v. Bd. of County Comm’rs for Converse County*, 52 F.3d 858, 861 (10th Cir. 1995).

<sup>13</sup> *Pound v. Airosol Co.*, 368 F.Supp.2d 1158, 1159 (D. Kan. 2004) (citing *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997)).

<sup>14</sup> *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citing *Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 944 (10th Cir. 1995)).

<sup>15</sup> *Pound*, 368 F.Supp.2d at 1159 (citation omitted).

<sup>16</sup> *Voelkel v. Gen. Motors Corp.*, 846 F.Supp. 1482, 1483 (D. Kan. 1994), *aff’d*, 43 F.3d 1484 (10th Cir. 1994).

reconsidered based on (1) an intervening change in the controlling law or (2) new evidence previously unavailable. Rather, Defendant appears to argue that the Court should reconsider its Memorandum and Order (doc. 81) based on the need to correct clear error or prevent manifest injustice; specifically, that the Court erred in excluding the “deal file.”

In support of its Motion, Defendant relies on *Hertz v. Luzenac America, Inc.*,<sup>17</sup> which summarizes the foundation necessary for the business record exception to hearsay under Fed. R. Evid. 803(6), apparently to support its claim that the deal file documents were improperly excluded by the Court. In addition, Defendant claims that Plaintiff’s objection to the deal file documents invited the Court to err in excluding this evidence, and that Plaintiff knows that the deal file documents (a) were produced by Plaintiff, (b) are Plaintiff’s business records, and (c) were created by Plaintiff’s employees in the normal course of business.<sup>18</sup> Finally, Defendant appears to argue that it did properly authenticate the deal file through the deposition testimony of Kelly and Janet Stoner that the deal file documents were produced by Plaintiff. In essence, Defendant seems to argue that the Court should have considered the deal file documents in deciding Plaintiff’s motion for summary judgment because (1) they qualify for the business records exception to hearsay under Fed. R. Evid. 803(6) and (2) they were authenticated through the deposition testimony of Defendants Kelly and Janet Stoner that the deal file documents were produced by Plaintiff.

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<sup>17</sup> 370 F.3d 1014, 1017 (10th Cir. 2004) (citation and quotations omitted) (To fall within the hearsay exception set forth in Fed. R. Evid. 803(6), “a document must (1) have been prepared in the normal course of business; (2) have been made at or near the time of the events it records; and (3) be based on the personal knowledge of the entrant or of an informant who had a business duty to transmit the information to the entrant.”).

<sup>18</sup> See Mem. in Supp. of the Mot. to Reconsider the Court’s Mem. and Order (doc. 88) at ¶¶ 2, 3, and 7.

The Court is not persuaded by Defendant's arguments. Defendant's Memorandum in Support of the Motion to Reconsider the Court's Memorandum and Order lacks any clear argument as to why the Court's exclusion of the deal file documents constitutes clear error or results in manifest injustice. Rather than providing any reasoned arguments supported by legal authority, Defendant makes conclusory statements that Plaintiff knows the deal file documents are business records that were created by its employees in the ordinary course of business, and that the deal file documents were authenticated when Defendants Kelly and Janet Stoner testified that the documents were produced by Plaintiff. Such conclusory statements are insufficient to show that the Court erred in excluding the deal file documents.

Defendant's argument regarding the business records exception to hearsay under Fed. R. Evid. 803(6) is misplaced. The Court did not exclude the deal file documents on the grounds that they constituted hearsay, but rather excluded the deal file documents on the grounds that they were not authenticated as required under Fed. R. Evid. 901. Furthermore, Defendant cannot skip the necessary step of authenticating the deal file documents by arguing that a hearsay exception is applicable. "The requirement of authenticity is separate from the requirement that a hearsay document must satisfy an applicable hearsay exception for admissibility. Authentication is required even if a hearsay exception is applicable."<sup>19</sup>

However, even if the Court had excluded the deal file documents on the grounds of hearsay, Defendant has not shown that the business records exception to hearsay under Fed. R. Evid. 803(6) applies to the deal file documents. The only evidence provided by Defendant regarding the deal file documents is the deposition testimony of Defendant Kelly Stoner that the deal file documents were

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<sup>19</sup> 32A C.J.S. Evidence § 1086.

produced by Plaintiff in discovery. The fact that Plaintiff produced these documents shows that they were in the possession or control of Plaintiff and were responsive to a discovery request. It does not, however, show the requisite foundation for the business records exception to hearsay - that the deal file documents were made by Plaintiff in the normal course of business at or near the time of the events recorded in the documents by a person with personal knowledge of the information in the documents.<sup>20</sup>

Defendant also appears to argue that the deal file documents were authenticated by the deposition testimony of Defendant Kelly Stoner that the documents were produced by Plaintiff. However, as the Court previously explained in its Memorandum and Order (doc. 81), under Fed. R. Evid. 901, “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”<sup>21</sup> The fact that the deal file documents were produced by Plaintiff during discovery does not provide sufficient evidence to support a finding that the deal file documents are what Defendant claims. Furthermore, as the Court previously explained in its Memorandum and Order (doc. 81), the deposition testimony of Defendant Kelly Stoner cannot serve to authenticate the documents because Defendant failed to provide any evidence that Defendant Kelly Stoner had personal knowledge of the deal file documents and, therefore, his testimony is inadmissible to authenticate the deal file documents under Fed. R. Evid. 602. Accordingly, the Court concludes that Defendant has failed to provide any reason why the Court should reconsider its Memorandum and Order (doc. 81) granting Plaintiff’s motion for summary judgment on

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<sup>20</sup> See *Hertz*, 370 F.3d at 1017.

<sup>21</sup> See Mem. and Order (doc. 81) at 9 (quoting Fed. R. Evid. 901(a)).

Defendant's counterclaim.

#### **IV. CONCLUSION**

Defendant has failed to show that the Court should reconsider its Memorandum and Order (doc. 81), specifically its decision to exclude the deal file documents. Defendant has not shown (1) an intervening change in the controlling law, (2) new evidence previously unavailable, or (3) the need to correct clear error or prevent manifest injustice. Accordingly, the Court denies Defendant's Motion.

**IT IS THEREFORE ORDERED** that Defendant's Motion to Reconsider Memorandum and Order (doc. 87) is denied.

**IT IS SO ORDERED.**

Dated in Kansas City, Kansas on this 21<sup>st</sup> day of April 2009.

s/ David J. Waxse  
David J. Waxse  
U.S. Magistrate Judge

cc: All counsel and *pro se* parties